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REGULATION OF OUTSIDE EMPLOYMENT FOR CITY EMPLOYEES

What is the legal basis for regulating outside employment? What standards and guides are available for city officials?

In a time of inflation and rising consumer demand for goods and services, many city employees are turning to outside jobs to supplement their income from their jobs in the city service. Such employment has become so widespread in recent years that a number of cities have studied the problem and taken steps either to prohibit such employment or to draft strict regulations and procedures to control such employment.

Outside employment was the subject of a special committee report of the city manager department of the League of California Cities (hereafter referred to as the California report). This group surveyed outside employment policies in 1952 in major California cities, and the extent of outside employment is indicated by the following quotation:

"Extent of outside work. While it is difficult for any city to know just how many of its employees are engaging in outside work, even if permits are required, there is some indication of the magnitude of the problem from the estimates of percentages of certain employee groups supplied by some cities over 25,000 population. Eleven cities reported an average of 24 per cent of their policemen engaging in outside work, with a maximum of 50 per cent. Eleven cities reported an average of 35 per cent of their firemen working outside, with a high of 75 per cent. The average was 12 per cent among mechanical and construction workers of nine cities, and 5 per cent among office workers of seven cities. Clearly there is a great deal of outside employment, mostly among the uniformed employees with the firemen presenting the greatest problem."

In New York the municipal fire department has issued detailed regulations governing outside employment for fire department personnel. The recent annual conference of the International Association of Fire Chiefs devoted a panel session to "Should Paid Firemen Be Permitted Outside Employment?" The fire chief from Minneapolis served as moderator and the panel included chiefs from Detroit, Chicago, and Los Angeles County. The panel reflected strong opposition to outside employment for firemen although there were some differences of opinion as to how the practice could be eliminated. A 1956 survey in Denver showed that 40 per cent of the policemen and firemen held off-duty jobs and that many had union cards for their off-duty work.

The extent of municipal attempts to control outside employment is not generally known. A clue can be gained from data shown in the California report. Of 69 cities reporting, 29 had some policy of restriction on outside employment of municipal employees. This survey indicated that generally the restrictions on outside employment are more prevalent in the larger cities.

An American Municipal Association survey of outside employment policies for firemen in nine large cities showed that seven of these nine cities prohibited outside employment entirely and two allowed it only on a limited basis.

It is the purpose of this report to review the legal basis for controlling outside employment and to suggest methods for city officials for control based on the experience of other cities. Subsequent sections of this report discuss legal authority, prohibition and regulation of outside employment, elements of policy and procedure, and outside employment of firemen. The supplement at

the end of the report shows ordinances and regulations on outside employment from selected cities.

Legal Authority

The question of outside employment has not been litigated very frequently in the courts. The few decisions that have been rendered, however, would seem to indicate that the city has authority to control outside employment where there is a question of interference with the employee's efficiency on his regular city job or where there is an actual or potential conflict of interest.

Two New York state cases seem to uphold the view that a city cannot validly restrict outside employment of city employees (other than policemen and firemen) so long as there is no effect upon the employee's efficiency on the city job or a conflict of interest. These cases are *Putkowski v. Carey*, 52 N.Y.S. (2d) 42, decided in 1944, and *Natilson v. Hodson*, 35 N.Y.S. (2d) 537, affirmed 289 N.Y. 844, 47 N.E. (2d) 442 (1943). In the latter case the New York State Court of Appeals held that the absolute prohibition of outside employment exceeded the powers conferred on the department heads by the New York city charter.

The few decisions available would seem to indicate some difference in the attitudes of the courts toward policemen and firemen; apparently more stringent regulations or even flat prohibitions are acceptable for these groups. For example the Wisconsin state supreme court unanimously upheld a Milwaukee fire department regulation prohibiting firemen from working on their off days. The firemen had contended that they were compelled by economic circumstances, illness, and other factors to seek outside work to supplement their salaries.

In upholding the regulation the Wisconsin court said: "It is conceded that the rule and the ordinance must bear a rational relationship to the maintenance of an efficient fire department. One of the reasons for the rule is to insure that members of the department will be at all times in physical condition to perform their duties if called upon to perform them. . . . A fireman is subject to call for duty 24 hours a day If the rule is harsh it is for the individual to determine whether he will subject himself to its terms by becoming a member of the department. The right to work for the public is a privilege which may be granted on any conditions which the public may impose, consistent with the law and public policy, and when an individual enters such employment, he impliedly surrenders certain natural rights which would remain his if he were a private citizen."

Flat prohibitions against outside employment would seem to require statutory or charter authority. The California report indicated that four cities have charter provisions prohibiting outside employment. In Long Beach the charter provision applies to all employees while the charter prohibitions in Sacramento, Stockton, and Bakersfield apply to policemen and firemen only. Oakland prohibits outside employment of firemen and policemen by administrative regulation.

Prohibition of Outside Employment

An absolute prohibition against outside employment for all employees seems to be of little value for at least three reasons. First, it is not likely that such a prohibition would be sustained if appealed to the courts. Second, an absolute prohibition would be extremely difficult to enforce. Third, such a prohibition would seem excessively arbitrary and unreasonable to the great majority of city employees. They can cite many examples of outside work that do not interfere with the employee's efficiency and do not involve any conceivable conflict of interest.

As a practical matter then prohibition of outside employment should be resolved on the question of prohibition under certain stated conditions. The four major elements for prohibition that should apply are the following:

Impairment of Efficiency. Outside jobs can affect the employee's effectiveness on his municipal job for several reasons. One of the most important is that the outside job will be excessive in the length of time involved and physical demands made so that he will be too tired to do good work for the city. Another consideration is that the outside job will involve the employee in a number of phone calls and personal time off from his city job to take care of his outside work. Either way the

city government is the loser in having an employee who is not doing the amount and quality of work expected.

Conflict of Interest. A public employee must carry on his work with neutrality and objectivity. He should represent the public and not a certain segment of the public. Incompatibility or conflict of interest is obviously involved when a city employee acts in a selling capacity as a private individual and as a buyer or purchasing agent in his governmental employment. Conflict of interest arises when a person serving as an attorney or policeman is engaged in off-duty inspectional or enforcement work for private employers. A firefighter should not be engaged in selling fire insurance or firefighting equipment.

Conflict of interest raises the possibility of unethical and even illegal activities on the part of city employees. Of greater importance, however, is the fact that the city government should not be left open to criticism on the charge of questionable conduct by municipal employees who might profit because of their governmental connections.

Competition with Private Equipment. Outside employment can be a problem when either of two conditions arise with respect to competing employment. First is the outside employment of a municipal worker that deprives somebody else of his job. This was a very important factor during the depression period of the 1930's but seldom is applicable today. Second is the conflict of employment with highly organized trade unions.

The latter situation occurred in Denver, Colorado, recently. As a result police and fire officials of the city and union representatives agreed to permit policemen and firemen to continue to work at outside jobs only so long as they did not conflict with jobs held by civilian union members. If a union complains that a policeman or fireman is keeping a civilian worker from a job, the complaint goes to an arbitration board of police, fire, and union officials. If the complaint is upheld the officer in question must either resign from the force or quit his off-duty job.

In another city the labor unions are not protesting outside work by city employees partly because there is a labor shortage in the area. In addition the city has three groups of unionized employees among its own work force.

Public Relations. The effect of outside employment upon the opinion of the general public always must be considered. It obviously creates a poor impression to have a policeman working as a bouncer in a night club or as a bartender.

Regulation of Outside Employment

Rules and regulations on outside employment of city employees do not lend themselves to general and neutral across-the-board application. Each case must be judged individually with respect to the effect upon municipal employment. Some cases are bound to be borderline in character. For these reasons the control of outside employment is better considered as a management than a personnel problem.

Regulatory Authority. The legal authority for regulating outside employment will vary from city to city depending upon statutory, general law, charter, and ordinance requirements. The easiest and most workable method would be to have outside employment regulated by ordinance, administrative regulation, or personnel rule. Such a regulation should leave discretion with city officials to decide each application upon its merits rather than attempting to map detailed regulations which would cover all situations.

The California report states that 16 cities give the city manager authority to approve outside work, seven place this responsibility on the department head, two on the civil service commission, and one on the personnel director. In all cases department head approval is required if final approval is given elsewhere.

The supplement to this report shows the regulations adopted either as personnel rules or administrative regulations in seven cities. The ordinance for Monterey, California, provides that the city manager shall review each individual request for outside employment. Other cities shown in the supplement provide for approval by the department head or the city manager.

Elements of Policy. While it is doubtful that it is either defensible or desirable to prohibit outside employment, there is no question of the desirability of regulation. Such rules and regulations should have service-wide application as far as possible, although special provisions may be necessary for policemen and firemen because of the nature of their work. Attempts to regulate outside employment probably should be limited to those employees who have permanent status under a formal civil service system. In the absence of formal civil service, the regulations should apply to those employees considered as permanent, full-time members of the city force.

Many cities may not need anything more than a brief statement of municipal policy as shown in the excerpts in the supplement to this report. For cities, however, where the problem of outside employment is becoming acute, a more detailed check-list may be desirable to serve not so much as binding regulations but rather as a guide to administrators in passing upon each application for outside employment. The elements of policy that should be considered for such a check-list are the following:

1. Impairment of Efficiency. The outside job must not interfere with the employee's effectiveness upon his city job. Consideration should be given to the number of hours worked outside, the location of the outside employment, and the nature of the duties involved (see further discussion above).
2. Physical Well-Being. The outside work must not leave the employee tired or subject to injury upon his regular job with the city.
3. Workmen's Compensation. The outside employment must be such that no problem arises as to municipal responsibility for an injury incurred in the outside job. Quoting from the California report, "An employee might be required to furnish proof that he is covered by workmen's compensation insurance in his outside employment. This should help to reduce the possibility that injuries resulting from the outside work may be attributed by the employee to his city work and the costs assumed by the city. In addition, sick leave might be denied for an accident occurring in outside employment, although this might tend to cancel the value of insuring workmen's compensation coverage on outside work."
- "A definite time limit might be placed upon permissible outside work, such as two or three hours in any day in which a full city shift is worked, and eight hours maximum in any one week."
4. Conflict of Interest. As described above there should be no work approved which places the employee in the ambiguous position of performing duties or services which he will later check or inspect in his capacity as a city employee.
5. Competition with Private Employment. The two factors here which should be considered are the taking of jobs from other persons in a depressed labor area and potential conflict with organized craft unions (see further discussion above).
6. Public Relations. The public relations effect of outside jobs should be considered with particular attention to employment that is acceptable in a given community.
7. Supplementary Employment. No employee should be allowed to take an outside job which is full-time. While it might seem obvious, this question can arise particularly for fire department employees who have the extremely liberal work arrangement of 24 hours on and 48 hours off. A full-time outside job is bound to make so many demands upon the employee that it carries over to his duties with the city either in impaired efficiency or demands upon his on-duty time.

With all of the restrictions on outside employment that have been considered above, the question remains as to what is permitted for city employees. An important consideration is that the work should be truly supplementary. Examples include work as a church organist, night school teaching, secretary for a fraternal organization, refereeing or umpiring at sports events, and similar avocational activities.

Permit Procedure. Some cities may find it desirable to formalize the outside employment procedures still further by providing that each employee must submit an application in written form and receive a permit. Such a form need not be complicated. It should show the name and

address of the employer, the hours of work, a description of the duties, and should include a space for approval or disapproval by the immediate supervisor and department head. The form also should include space for a certification from the outside employer stating that he knows the applicant is a regular employee of the city. Such work permits should be reviewed and renewed at periodic intervals (perhaps each six months) to insure that the employee is still working under the terms of the original permit.

The department head or city manager in reviewing the application should satisfy himself that the employee has a good service record, is prompt in attendance, has not taken excessive sick leave, and is carrying on his regular job well in all other respects.

Outside Employment of Firemen

The greatest amount of outside employment seems to occur among municipal firemen. At least two reasons for this can be surmised. Firemen have more time for outside employment than any other group of city employees, especially when they have periods of off-duty that range from 24 to 72 hours. Second, firemen are able to learn a number of semi-skilled assignments in their regular duties on fire drill, maintenance of fire apparatus, and maintenance and repair of station houses.

The extent of the problem is illustrated by a news item carried in *American Municipal News* (published by American Municipal Association) for July, 1956, which discussed the regulations of fire departments on outside employment in several large cities. This item showed that Richmond, Virginia, granted approval through the fire chief when the off-duty employment does not interfere with regular work of the department. Outside employment is limited in Milwaukee, Wisconsin, on a very restricted basis to employees who have been incapacitated and are unable to perform their regular duties. Such permission is only granted for six months. Outside employment for firemen is prohibited entirely in Baltimore, Detroit, Long Beach (California), Minneapolis, Newark, San Francisco, and Syracuse.

Where the situation seems critical cities can adopt rather detailed regulations similar to those adopted by the New York city fire department. These regulations, adopted in July, 1956, specifically prohibit firemen from taking certain outside jobs including services to eliminate fire violations, sales of fire equipment, sales of tickets while in uniform for lotteries or other purposes, soliciting for commercial and professional fund raising drives, or "the soliciting of business of any kind where the prestige of a member's fire department connection enhances his value as a solicitor."

New York firemen must obtain written approval before taking other types of employment such as insurance adjusting; insurance sales; employment of other members of the fire department; automobile insurance; hazardous occupations; all occupations requiring a certificate of fitness or special permit from the fire department; installations of oil burners, refrigeration equipment, air compressors, gasoline tanks, and similar equipment; and any ownership, management, or control of corporations, partnerships, or businesses employing three or more persons or "involving the investment of substantial sums of money, and heavy contractual business commitments."

The New York regulations further specify that firemen who are granted permission to practice law "or other occupations considered professional" must obtain written approval of the employment board every six months for the extension of the work permit.

The New York regulations provide for an employment board to administer and enforce the regulations and to make decisions on individual cases. The board is composed of the fire chief, two deputies, the president of the Uniformed Fire Officers' Association, and the president of the Uniformed Firemen's Association.

Conclusions

Outside employment (which might better be termed supplementary employment) should be considered a privilege of the employee rather than a right. It should be granted, subject to management review, only on the basis of the various criteria discussed in this report.

The city government is obligated to establish and maintain the conditions which will hold outside employment requests to a minimum. This implies good personnel management, adequate working conditions, and a pay scale for all classes of positions that is in line with comparable employment elsewhere in the community. The obligations of the city government are well stated in the California report:

"A policy restricting outside work is untenable if municipal wages are below those prevailing in private enterprise and neighboring governmental units. Under such circumstances, a city may be lucky to retain its employees, and may be doing so only because many of them do find outside work. This fact was alluded to by a number of smaller cities with no restrictive policy. One manager suggested that a change in his policy of 'no policy' should be made only along with carefully studied changes in pay scales, hours of work, and work requirements.

"Community conditions must be considered including the prevailing sentiment among private employers toward outside work by their employees, and current economic conditions. The city government must be prepared to defend a policy more restrictive than that of private employers, if it chooses to adopt one."

Acknowledgment. The California report was especially helpful in the preparation of this MIS report. It was issued in October, 1952, under the full title of *Report of the Special Committee on Outside Employment of City Employees to City Manager Department, League of California Cities*. City Manager A. P. Hamann of San Jose served as chairman of the special committee.

MUNICIPAL ORDINANCES AND REGULATIONS ON OUTSIDE EMPLOYMENT

Santa Monica, California

Outside Employment. Full-time employees of the City may engage in part-time or occasional employment or occupation outside of their regular working hours if such employment will not interfere with the efficient performance of their duties for the City, and is approved in writing by the Personnel Board on recommendation of the appointing authority, after certification by the prospective employer that no other qualified person not in the employ of the City is available to perform the work in question. (1948)

Two Rivers, Wisconsin

Outside Employment. As a general rule, the City does not favor its employees holding jobs with other employers and working for the City at the same time. If outside work contributes to reduced effectiveness on the job, an employee will be given the alternative of terminating this work or his city employment. Each employee is expected to see that his outside employment is covered by workmen's compensation. No sick leave with pay will be allowed for injury incurred while working for other employers. The City's group hospitalization and medical policies also will not make payments for such injuries or illness. (1953)

Chico, California

Outside Employment: Full-time City employees may not carry on, concurrently with their public service, any private business or undertaking, attention to which affects the time or quality of their work or which casts discredit upon or creates embarrassment for the City government. (1952)

Tucson, Arizona

Outside Employment. City employees are not allowed to have other employment which conflicts with their work for the City. Before accepting any job in addition to your City service it should be discussed with your department head who will advise you whether or not such proposed employment would conflict with your City duties. (1956)

Ogden City, Utah

Restriction on Outside Work. Employees are prohibited from engaging in regular employment or in a gainful occupation outside their city positions, except when written approval of the department head first has been obtained. (1954)

Ontario, California

Outside Employment. Employment outside of regular City employment is to be discouraged since no person can do two jobs well. If the employee deems it absolutely necessary to obtain work in addition to his regular City job, he shall first secure the approval of his Department Head and the City Manager.

Outside employment other than Orchard Heater Inspection or other special City employment must be approved by the Fire Chief in writing.

Outside employment other than Special Police work paid through the City payroll must be approved in writing by the Chief of Police. (1954)

Monterey, California

No full time employee of the City shall engage in any occupation or outside activity which is incompatible with his employment by the City. Any officer or employee engaging in such occupation or outside activity for compensation shall inform the City Manager of the time required and the nature of such activity, and the City Manager shall determine whether or not such activity is incompatible with City employment. (1953)

San Jose, California

Restrictions on Outside Work. Every employee except seasonal, part-time, and emergency employees, is prohibited from engaging in regular employment or in a gainful occupation outside his City position which is incompatible with his City employment or which is of such a nature as to prevent him from discharging his regular duties in a satisfactory manner. No employee may engage in or accept employment of any type in excess of eight hours in one week or become engaged in any gainful occupation which requires an excess of eight hours per week without the specific prior written approval of the Appointing Authority and the Civil Service Commission. Violation of this section shall be cause for suspension by the Appointing Authority. The Commission may recommend suspension whenever it finds such violations have occurred. The Civil Service Commission shall establish the criteria and procedures for granting of permits for outside work. (submitted for adoption, 1957)

